IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1811 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DINESHBHAI @ IQBALBHAI SHANKERBHAI MARWADI - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MS NITA C BANKER for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 23/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 By this appeal the appellant has challenged judgement and order of conviction and sentence dated 18th August 2006 passed by the learned Additional Sessions Judge, Court No.12, Ahmedabad City, whereby the Sessions Court has acquitted the appellant-accused for the commission of offences under section 498(A), 323 and 307 of IPC and convicted the appellant for the commission of offence under section 302 of IPC for suffering life imprisonment and fine of Rs.500/-, in default to under go further three months rigorous imprisonment.

2.0 According to the prosecution, the appellant-accused is husband of original complainant Aishaben is staying at Bhairavnathni Chali, behind Cremation House, Ahmedabad. The husband of Aishaben Salim Shaikh had expired and on his death Aishaben married to the present appellant accused. Out of her first marriage she had two daughters who are staying with her. According to her the present

appellant-accused was in the habit of taking liquor and was regularly quarrelling with the complainant Aishaben and he was always having suspicious nature. She used to go for household works and if she did not give money to the present appellant he used to beat her. During the month of Ramsan the appellant had quarreled with the appellant and set her residential premises on fire.

3.0 On 6.4.2004, in the afternoon at about 1400 hours, when she was at her residence, the appellant accused had gone there in drunken condition. Since he was suspicious of her, she was beaten and ultimately she was saved because of intervention of the neighbours. At that time the appellant-accused had run away. On the same day viz. 6.4.2004 at about 2200 hours when she was sleeping along with her two daughters outside her house, the appellant accused came there in drunken condition. She was taken inside the house and beaten there. During the scuffle the appellant-accused got enraged and poured kerosene from a can and set her on fire. She had raised shouts and she was on flames. On hearing the shouts neighbours rushed there and

some of them poured water on her. The appellant-accused ran away from the spot. Aishaben suffered burn injuries on her face, chest, both hands and her body was totally burned. Her neighbour Jetuben Ahmedbhai and Manjuben Pursottam Solanki had taken her in an autorickshaw to the civil hospital and she was admitted in emergency ward for primary treatment. At that time she was conscious. Complaint was lodged before Naranpura police station and the same was recorded by PSI as per the say of the complainant. The said complaint was signed by Incharge Police Station Officer of Naranpura Police Station. The said complaint was registered as Crime Register No.I 198 of 2004 and investigation was handed over to one Mayurvanshi and in turn it was handed over to PI Chhaganlal Raval.

4.0 During the investigation the investigation officer has prepared panchnama and also recorded statements of certain witnesses and of the complainant. He has also collected samples from the scene of offence for the purpose of FSL and the appellant was arrested on 8th October 2004 and panchnama of his body was also prepared. The

complainant has expired on 15th April 2004 and therefore section 302 of IPC was added to the complaint. After filing of chargeshet the learned Metropolitan Magistrate has committed the case to the Court of Sessions, Ahmedabad and the case was numbered as Criminal Case No.171 of 2004.

5.0 The appellant accused was provided legal assistance at the government expenses and no bail was granted to the accused. After hearing the parties the Sessions Court has convicted the appellant-accused as stated hereinabove. It is against the said judgement and order of conviction and sentence the present appeal has been filed by the appellant-original accused.

6.0 Heard Ms Nita Banker for the Appellant and Mr. H.L. Jani for the State Government.

7.0 Ms. Nita Banker, learned Advocate for the appellant contended that the prosecution has failed to prove the presence of the

accused at the time of the accident nor there is any evidence on record to prove the guilt of the accused. It was contended that the trial court has failed to appreciate that the deceased has tried to commit suicide and burn injuries were not because of any reason alleged by the prosecution. She further contended that in view of the decision of the Apex Court the prosecution is required to prove the dying declaration,which it failed and therefore there is no case against the appellant. She therefore submitted that on the basis of the dying declaration he could not have been convicted.

8.0 Mr. Jani, learned APP, appearing for the state submitted that the evidence on record clearly shows that the appellant has committed the alleged act of setting fire of the complainant. According to him, the dying declaration clearly established the offences committed by the appellant. He submitted that the appellant was in the habit of taking liquor and beating and harassing the complainant and he has deliberately poured kerosene over the complainant and set her ablaze as a result of which the complainant has died. He, therefore, submitted

that there is no reason to disagree with the findings of the Sessions Court.

9.0 We have heard the learned Advocates for the respective parties and perused the relevant documentary evidence on record including the judgement. Record and Proceedings of the case were called for which were also perused minutely.

10.0 In order to prove the case the prosecution has examined Dr. Gautam Vrujlal Naik, (PW1-Exh.8) who conducted the postmortem report. According to him the burn injury was of second and third degree. 90% was the total burning and cause of death was burn injury. He has denied in cross that this was a case of suicidal death and he had stated that it can be stated only by the doctor who has treated the patient.

11.0 Prosecution has examined Mahamadsalim Nasikali Saiyyad (PW2-Exh.13) who was a panch witness. He has supported the panchnama of the scene of offence and the Panchnama is at Exh.14.

12.0 One Biharilal Tekchand Yadav (PW3-Exh.15) was examined to prove the inquest panchnama. He has supported the Inquest Panchnama at Exh.16. Dr. Rajendrakumar Bagirathprasad Josh (PW4-Exh.18) has been examined by the prosecution. He is the doctor who has given the primary treatment to the complainant at the civil hospital. He was Chief Medical officer on 6th April 2004 at the Civil Hospital at about 12 night. He has stated that the patient was brought from Bhairavnathni Chali and she was having third degree burns on her face, chest, back, both hands and legs. He stated that the case was referred for primary treatment to plastic surgery ward.

13.0 The prosecution has examined Khatubhai Raijibhai Khant (PW5-Exh.20) who was PSO at Naranpura Police Station and who has registered the Wardhi. The Wardhi was exhibited at Exh.21, which was proved. The prosecution has examined Atmaram Bharabhai Bharwad (PW6-Exh.22) who is the panch witness of panchnama in respect of clothes of the accused. One Madhusudan Manuprasad Pathak (PW7-

Exh 29) who is the officer of FSL was examined and FSL Report is at Exh.29. The prosecution has also examined Mahamadunus Abbasbhai Mansuri (PW8-Exh.31) who is the Executive Magistrate in whose presence the dying declaration was recorded on 7th April 2004. He has stated that he had put 17 questions which were answered correctly. The dying declaration is exhibited at Exh.33. The prosecution has also examined Jetunbibi Ahmedbhai Memon (PW9-Exh.34) and Manjulaben Pursottamdas Solanki (PW 10 Exh.35) who have taken the complainant to the Civil Hospital. Vijaybhai Kamraj Chauhan (PW11 Exh.37) was examined by the prosecution, but he was declared hostile. The Investigating officer (PW12-Exh.39) was examined who has proved the complaint and the material which were sent to FSL.

14.0 According to the postmortem report, the death was caused to the burn injuries on the body of the complainant.

15.0 Manjulaben Parshottamdas Solanki (PW 10– Exh.35) stated that she is the neighbour of the deceased. According to him the

appellant had burnt the house of the complainant about two years back. The appellant used to beat the complainant in drunken condition. She had also reached the scene of offence on hearing the shouts of the complainant. She was one of the persons who had taken the complainant to the hospital. In the hospital the complainant told her that her husband had set her fire.

16.0 In the evidence of Manjulaben it is proved that When the complainant was coming out of her house shouting, Manjulaben rushed there and covered her with a clothe and Jetunbibi put a Chhadar over her. They took the complainant to the hospital. According to Manjulaben, the complainant told her that her husband had set her fire. In the cross examination it was also stated that after the incident the husband of the complainant had run away. Manjulaben had also identified the appellant-accused in the court which is natural as he is the neighbour of the said Manjulaben.

17.0 It is a settled law that a conviction can be based on dying

declaration, without any corroboration, if it is made voluntarily, without tutoring or prompting. Normally a person on the verge of death is not likely to implicate innocent persons falsely, but at the same time this statement is not made before the Court on oath and the maker is not subjected to cross-examination. Therefore, the Court is required to scrutinize it carefully and if it is found truthful, then in that case, it can be acted upon and can also be used for recording a conviction. Once the statement of the dying person and the evidence of the witness/witnesses testifying to the same are found to be reliable on careful scrutiny, it becomes very important and a reliable piece of evidence and if, ultimately, the court is satisfied that the dying declaration is true and free from any embellishment, then such a dying declaration by itself could be sufficient for recording conviction, even without looking for any corroboration.

18.0 The dying declaration was recorded in the presence of the Executive Magistrate which is at Exh.33. In her statement in the dying declaration the complainant has clearly stated that she was staying with

her husband. Her husband used to take drinks every day and quarrel with her and he used to suspect her. If she does not give money to him he used to beat her. According to her statement, on the day of the incident at about 2 O' clock he had come there in drunken condition and quarreled with her. Thereafter at night when the complainant was sleeping outside the house the appellant came there, called her inside the house. When she went inside the house, he poured kerosene and set her ablaze and the neighbours brought her to the hospital. Therefore from the dying declaration it has become clear that the appellant has poured kerosene over the complainant and set her on fire. It is also required to be noted that on the very day of the incident at about 2 pm the appellant-accused had come to her house and quarreled with her. When the neighbours came there the appellant left the premises and came back at night. The statement of the complaint in the dying declaration corroborates with the statement recorded by the police. The doctor in his evidence stated that the complainant had stated that her both hands were burned and therefore she is not able to put her signature. Therefore her thumb impression was taken. There is no

reason to disbelieve the statement of the doctor. Panchnama of the clothes of the appellant is at Exh.23. Panchnama of the scene of offence is at Exh.14. From the scene of offence matches, burned clothes, match box, tin of kerosene, etc. were recovered. From the evidence it is established that there was kerosene smell in the clothes of the appellant. After perusing the FSL report the Sessions Court has come to the conclusion that the FSL report has fully supported the say of the complainant. From the overall evidence on record it is established beyond doubt the presence of the appellant at the scene of offence. The presence of accused is natural at the place of incident which is also evident from the corroborative evidence of Manjulaben. The evidence of all the witnesses supported the complaint. Thus, taking into consideration all the evidence into account, it is proved beyond reasonable doubt that the appellant has poured kerosene over the complainant and set her ablaze. All the circumstantial evidences are against the appellant-accused.

19.0 In view of the above discussion we are of the opinion that

the learned Advocate for the appellant is not able to assail the judgement and order of conviction and sentence passed by the Sessions Court. We are in complete agreement with the reasonings adopted and findings arrived at by the Sessions Court. This appeal is, therefore, dismissed.

[R.P. DHOLAKIA, J.]

[K.S. JHAVERI, J.]

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